IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Manohar Lal vs. Smt. Shakuntala & ors.

S.B. Civil Second Appeal No. 50/1993 against the judgment and decree dated 25.1.1993 passed by the Addl. Civil Judge No.2, Udaipur in Civil Appeal No. 27/91.

Date of Judgment: April 27, 2007.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Ms. Manish Shishodia for the appellant.
Mr. A.K. Acharya for the respondents.

BY THE COURT:

REPORTABLE

Heard learned counsel for the parties.

This second appeal is by the tenant-defendant against the judgment and decree of the first appellate court dated 25.1.1993 in Civil Appeal No.27/91 reversing the judgment and decree of the court of Munsif, Udaipur City (North) dated 8.4.1999 passed in Civil Original Suit No.136/81.

Brief facts of the case are that the plaintiffs-respondents filed the suit for eviction against defendant no.1-tenant Manohar Lal alleging that the suit premises was let out to defendant-appellant by the deceased Jagjeewan Lal, husband of plaintiff no.1 and father of plaintiffs No.2 and 3 and defendant no.2 in the year 1969 for a rent of Rs.400/- per month. The said original landlord Jagjeewan Lal was in government

service and he retired in the year 1979. According to the plaintiff, before that the plaintiff no.1's husband with his family, was not residing in Udaipur where the property in dispute is situated. After retirement of said Jagjeewan Lal, Jagjeewan Lal and his family started living at Udaipur. Jagjeewan Lal died on 4.8.1980 living behind the plaintiffs and defendant no.2.

The plaintiffs' contention is that the suit property was let out for residential purpose but it has been converted into commercial use by the tenant-defendant. The defendant for his commercial purpose dig a big underground for storing the kerosene and broke down the two gates which were situated in the boundary wall of the plaintiffs' property and widen the gates so that the defendant can bring in the tankers. The defendant also constructed two shops after demolishing boundary wall of the plaintiffs' property and handed over possession of the said two shops to the other persons. Thereby the defendant materially altered the suit premises. The plaintiffs also pleaded that the defendant sub-let the suit premises to one Prem Chand who remained sub-tenant of defendant no.1 from January, 1970 to January, 1972 and one portion to one Bhanwar Lal who remained sub-tenant of the defendant from January, 1970 to July, 1970 and, thereafter, the defendant sub-let one portion to one Bhanwar Lal and he remained in part of the premises as sub-tenant in the year 1976-77. Therefore, another ground for eviction

of the tenant was sub-letting of the part of the suit premises by defendant no.1 to the persons mentioned above.

In addition to above, the plaintiffs submitted that the defendant took three water connections and also obstructed uplifting the water to plaintiffs' residence. It is also alleged that the defendant started cleaning and washing his tankers in the premises and by that, caused damages to the walls of the plaintiff's property. It is also alleged that the defendant to harass the plaintiffs, filed the suit for injunction against the plaintiff and that suit, according to the plaintiffs, was filed with false allegations. It is also alleged that the defendant on 5.2.1981 disconnected the electricity supply of the plaintiff's house. Not only this when the plaintiffs tried to raise the height of her house's boundary wall, then the defendant's son Raj Kumar shown revolver and threatened the plaintiffs. The defendant also initiated proceedings under section 107, Cr.P.C. against plaintiff no.1 which was according to the plaintiff, dismissed by the concerned court. It is further alleged that the defendant with the help of police persons harassing the plaintiffs by lodging the false reports with the police. The defendant's son also filed a criminal complaint in the court of Judicial Magistrate. It is also alleged that the employees and the tanker driver of the defendant are causing nuisance in the night after consuming the liquor. They used to blow horn for longer period so that the plaintiff's' family may be harassed. It is also

stated that the defendant in fact wanted to purchase the house of the plaintiff in throw-away price and, therefore, the defendant-tenant is harassing the plaintiff and plaintiff's family members and in that effort, the defendant through his persons, teased and abused the plaintiff's young daughter also. The suit was filed in the trial court on 31.3.1981.

The defendant submitted written statement and admitted him to be tenant in the plaintiff's property. There is minor dispute about the let-out accommodation but that is not very much relevant because of the reason that defendant's own case is accepted then also he is tenant only in the premises of the plaintiff and in case decree for eviction remains then he is to vacate all and entire accommodation which is in possession of the defendant-tenant . The defendant's contention is that the suit property was taken on rent for composite use for residence as well as for doing business. The defendant started the business in the premises immediately from the time of tenancy. So far as the alleged constructions are concerned, the defendant submitted that he did not widen the way which was situated in the boundary wall of the plaintiffs. His further plea is that the wall was weak and fell down. Obviously, according to the defendant, the way which was in existence at the time of tenancy, it became wide because of this event. The defendant admitted that he though constructed the two shops but they are made of only wood and are of temporary nature and can be removed at any

time. He also pleaded that even these shops were built with the consent of deceased Janjeewan Lal- landlord. In addition to it, the defendant also pleaded that otherwise also he had a right as tenant to built the temporary shops in the rented premised as it is not material alteration. The defendant denied other allegations of causing nuisance and giving threat by defendant's son Raj Kumar. The defendant also submitted that whatever the proceedings were initiated by the defendant or his son, they had no relation in the present suit. The defendant submitted that the persons named by the plaintiff as sub-tenant, they were persons known to Jagjeewan Lal and on his (Jagjeewan Lal's) request, they were accommodated by the defendant for shorter period but they were not the sub-tenants of defendant-tenant. The defendant also admitted that he constructed big water-tank in the open rented space but that was with the permission of deceased Jagjeewan Lal.

In the trial court, issues were framed on the basis of the pleadings of the parties which were in relation to sub-letting, the material alteration, the default in payment of rent, creating nuisance by the defendant and on the basis of the plea of the defendant, an issue was framed, whether the underground tank was built by the defendant with the consent of the plaintiff No.1's husband. The issue about change of user was also framed apart from the issue about the territorial jurisdiction of the trial court.

In the trial court, the plaintiffs produced PW-1 Dr. Parmeshwar Nath Mathur, the brother of plaintiff no.1, the plaintiff no.1 gave her statement as PW-2 and produced the witnesses PW-3 Chhatar Singh, PW-4 Bhanwar Lal and PW-5 Naresh Chandra Bhargava.The defendant himself gave his statement as DW-1 and produced witnesses DW-2 Fateh Singh, DW-3 Yasin Khan, DW-4 Nathu La, DW-5 Shankar Lal, DW-6 Shanti Lal, DW-7 Chandan Mal, DW-8 Chandra Prakash, DW-9 Om Prakash, DW-10 Laxman Singh and DW-11 Braham Dev.

The trial court held that the plaintiffs failed to prove that the defendant has changed the use of the premises from residential to commercial as the plaintiffs failed to prove that the suit property was let out only for residential purpose. The trial court also observed that the plaintiffs could not prove any consideration for creation of sub-tenancy and further in fact the alleged sub-tenants Prem Chand and Bhanwar Lal were accommodated by the defendant as guest on the request of the landlord deceased Jagjeewan Lal. Therefore also, the plaintiffs failed to prove sub-letting of the suit premises by the defendant no.1. The trial court, after considering the evidence of DW-11 Braham Dev and other witnesses, observed that Braham Dev, in his statement stated that when he was tenant in the premises before the present tenant, the width of the gate was 11-12 ft. and that time also, he used to bring the kerosene tankers within the rented premised and,

therefore, the plaintiffs failed to prove that the defendant himself widen the gate. On the basis of the evidence of Braham Dev and other witnesses, the trial court held that the business of kerosene was continuing from the time of Braham Dev in the suit premises and, thereafter, by the present tenant-defendant-appellant. For construction of two shops, the trial court observed that the plaintiffs filed the suit after seven years from the construction of the shops by the defendant and that too original landlord Jagjeewan Lal did not object for construction of the shops. Therefore, it cannot be said that the defendant made any alteration in the suit premises which is material alteration and further the plaintiffs failed to prove that the alteration was made without the consent of the landlord. The trial court held that the plaintiffs failed to prove the allegation of creating nuisance by the defendant. In the totality, all the issues were decided by the trial court against the plaintiffs and, therefore, the trial court dismissed the suit of the plaintiff by the judgment and decree dated 18.4.1988.

The plaintiffs preferred regular first appeal before the first appellate court. The first appellate court accepted the plaintiffs' explanation about the late filing of the suit on the ground that the plaintiff No.1's husband with his family was not residing in the city of Udaipur due to his government service and found the contention of the plaintiffs believable that because of the fact that the act of the

defendant came to the knowledge of the plaintiff no.1's husband, therefore, he got his service transferred to Udaipur and in the year 1980, the plaintiff no.1's husband died and the plaintiffs filed the suit without any delay in the year 1981.The appellate court observed that the defendant in his written statement, stated that he built temporary wooden shops in front of the property but from the evidence it is proved that the suit shops were constructed by use of cement and bricks and shops are structure of permanent character. The plaintiffs also produced the photograph (Ex.7) in support of the contention that the shops were not of wood but are permanent construction raised by use of bricks and cement. The first appellate court observed that the defendant's contention is self-contradictory as he stated that he had a right to built temporary wooden shops and, at the same time, the defendant says that he built these two shops after obtaining consent from the landlord Jagjeewan Lal. The construction since is of permanent nature and is in front of the house and by that time, the tenant has built two shops in the rented premises, therefore, it amounts to material alteration. The first appellate court also held that the defendant's contention that he built the underground and put the tanker in the underground with the consent of the landlord, the defendant failed to produce any reliable evidence. The said act of the defendant was found to be act of material alteration by the defendant without the permission of the landlord. The

first appellate court reversed the finding of the trial court on issue of sub-letting also. In view of the fact that it is not in dispute that the three rooms were given to other persons and one of the witnesses, the sub-lettee was produced by the plaintiffs who deposed that he paid rent of Rs.100/- per month to the defendant. In view of the findings on the question of sub-letting and material alteration, the first appellate court allowed the appeal of the landlord by judgment and decree dated 25.1.1993 and passed the eviction decree against the defendant-tenant-appellant. Hence this second appeal.

The learned counsel for the appellant submitted that the plaintiffs did not plead that the suit property was sub-let by the defendant to the persons named in the plaint without permission of the landlord. Therefore, the finding of the first appellate court that sub-letting of the part of the premises by the defendant was without the consent of the landlord cannot be sustained. The learned counsel for the appellant also submitted that in fact the alleged two shops are on municipal land in front of the let-out premises. Then by demolishing any portion of front boundary wall of the rented premises, if any construction has been made over a municipal land by the tenant, then it cannot be a material alteration or a construction within the rented premises and, therefore, no decree could have been passed by the court below on the basis of the said act of the defendant, nor mere

demolition of wall (not admitted by the appellant-defendant), it can be said that the suit premises has been materially altered by the defendant. The learned counsel for the appellant read over the statements of the plaintiff and plaintiffs' witnesses to show that none of the witness had personal knowledge about the terms and conditions of the lease. The defendant produced witness Braham Dev (DW-11) who was the tenant in the same premises before it was let out to the defendant. Even said Braham Dev himself was doing the business of kerosene in the suit premises. The defendant was also doing the same business and took the premises on rent for doing business. This business continued from the time of tenancy and both the courts below have not decreed the suit of the plaintiffs against the defendant on the ground of change of user. Then the defendant was doing the business of kerosene in the suit premises since the time of his tenancy is the fact found proved by the two courts below. The defendant also produced documentary evidence to show that he took the license for running the kerosene trade in the suit premises as well as installed underground water-storage tank in the suit premises after obtaining permission from the competent authorities. The plaintiff's explanation that the original landlord Jagjeewan Lal was not living in Udaipur and, therefore, did not file the suit, cannot be believed because of the reason that according to the plaintiffs themselves, their accommodation for

residence in the city of Udaipur was in the same building. Therefore, it cannot be believed that the original landlord Jagjeewan Lal could not know about the construction raised by the defendant. Therefore, the plaintiffs who have filed the suit under assumption that the constructions were raised by the defendant-tenant in the suit premises was without the consent of the landlord, should have been rejected by the first appellate court also. According to the learned counsel for the appellant, the trial court gave cogent reasons for deciding the issues against the plaintiffs but those findings have been reversed by the first appellate court by wrong appreciation of the facts of the case as well as evidence.

The learned counsel for the appellant-tenant also submitted that the allegations of sub-letting, on the face of it, were false. The two of the alleged sub-lettees were none else than the persons employed in the same department in which the deceased Jagjeewan Lal himself was in service. The plaintiffs failed to prove that any consideration was paid by the sub-lettees to the defendant. In fact these persons were accommodated as guests of the landlord himself and that situation sought to be encashed by the landlord after about 10 years of the incident as the allegation of first sub-letting was of the year 1970 and the suit has been filed after the death of original landlord Jagjeewan Lal in the year 1980.

The learned counsel for the respondents vehemently submitted that the first appellate court carefully considered the each and every aspect of the facts of the case and considered the evidence of the parties and thereafter recorded the finding of fact of material alteration as well as sub-letting against the defendant-appellant. Therefore, according to the learned counsel for the respondents, no substantial question of law is in fact arises in this appeal and the appeal be dismissed. The learned counsel for the respondents further submitted that the facts are not in dispute, rather say, the facts are admitted so far as the constructions are concerned. The defendant himself admitted that the front wall of the rented premises had a smaller way and the defendant's contention in the written statement was that that wall was weak and fell down and, thereafter, the way became wide, then in that situation, the statement of DW-11 Braham Dev is contrary to the stand taken by the defendant as DW-11 Braham Dev stated that the way was wide enough to the extent of 11-12 ft. before letting out of the property to the defendant-appellant so that the tankers may come within the suit premises. The defendant by this pleading in the written statement admitted that the way stands widen and because of that only, the tankers could come in the suit premises. So far as digging a big pit in the open rented premised, that too in front of the building and within the boundary wall of the rented premises, is an admitted fact by

the defendant and his plea is that it was with the consent of the landlord. Because of the said admitted facts, if the first appellate court rejected the plea of the defendant that it was done with the consent of deceased Jagjeewan Lal, then that is also a pure question of fact only. In the written statement, the defendant stated that the two shops which admittedly have been built in front of the rented premises, that too after breaking the front wall of the rented premises, were of wood, whereas, admittedly and found proved by the first appellate court that the shops were not made of wood but were made of bricks and cement and the constructions if of permanent nature. The contention of the appellant that structure can be removed is not a ground for refusing the decree of eviction of the tenant on the ground of material alteration because of the simple reason that there are very much construction of permanent character which can be removed and the property may be put to the original condition. That does not mean that the tenant gets right to materially alter the rented premises against the wishes of the landlord.

The learned counsel for the respondents further vehemently pointed out that the defendant in his written statement admitted that the shops are within the rented premises and in his statement before the court below, in fact denied the title of the landlord so far as that portion of the rented premises is concerned. However, it is admitted

case that the plaintiffs did not amend the suit for obtaining decree on the ground of denial of title of the landlord in his statement before the courts below for the part of the suit premises.

I considered the submissions of the learned counsel for the parties and perused the record also.

Following substantial questions of law were framed by this Court while admitting the appeal on 26.4.1993:-

> *"(1) Whether in view of statement of PW-1 Parmeshwar Nath and PW-2 Smt. Shakuntala Devi; coupled with absence of specific plea that the sub-letting of the suit premises in favour of persons named in para 7 of the plaint was without permission of the landlord; the findings arrived at by the court that the subletting of suit premises was without consent of the landlord, is such at which no reasonable man could arrive at ?*
>
> *(2) Whether construction of two shops on the municipal land in front of let out premises, by demolishing such portion of the boundary-wall in front of which the shops have been constructed, amounts to such construction which can be said to have materially altered the suit premises ?*
>
> *(3) Whether for the purposes of raising ground of eviction under Sec. 13(1)(c) of the Act, the 'construction' envisaged must necessarily be construction within the let-out premises or any construction which has the effect of materially altering the leased premises, can furnish a ground for eviction."*

The first substantial question of law has been framed principally on the plea taken by the appellant in second appeal that the plaintiffs did not plead that the tenant sub-let the part of the suit premises “without permission of the landlord” and further in the statements of PW-1 and PW-2, the plaintiff No. 1's brother and plaintiff no.1 herself did not said specifically that the sub-letting was without the permission of the landlord. So far as objection against the insufficiency of the pleading is concerned, in the facts of this case, is not available to the appellant-defendant-tenant because of the simple reason that the appellant-defendant did not raise any objection in the written statement about the lack of pleading. Further the defendant clearly understood that the case of the plaintiffs against the defendant for his eviction has been filed by taking help of the specific provisions of law made under sub-clause (e) of sub-section (1) of Section 13 of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 and, therefore, he specifically took a defence that the persons named by the plaintiffs were put in possession with the consent of the landlord. The issue was contested by the defendant himself on the question of fact of alleged sub-lettees' possession in the suit premises with the permission of the landlord, then the tenant-defendant cannot take any stand contrary to his own stand taken before the two courts below in second appeal. Other reason for not allowing the defendant to take this plea is

that if the tenant would have taken appropriate defence in time by raising objection in the written statement, the landlord could have amended the plaint to incorporate the appropriate words which according to the defendant-tenant should have been in the written statement and lastly, the plaintiff's filing the suit for eviction of the tenant under sub-clause (e) of sub-section (1) of Section 13 clearly says that the plaintiff is seeking decree of eviction of tenant under the said clause on the ground of sub-letting and that sub-letting by the meaningful reading of the plaint, clearly shows that that was without the permission of the landlord. When one party alleges the fact constituting a ground for eviction of tenant and other party, the tenant understood under which provisions of law the eviction has been sought by the plaintiff-landlord, then the plea of lack of pleading in second appeal, cannot be entertained. The pleadings are meant for making understand the other party and cannot be used for defeating the just cause of any party merely on technical grounds. It appears that the defendant-appellant in the present case, after decision on issue of sub-letting against him wants to become wise and took this plea of lack of pleading as well as absence of specific statements of the landlord and his witnesses. In the facts and circumstances of this case, this Court can not accept such plea of belated stage and which is founded only on the technicalities of law. By his conduct, the defendant-tenant permitted

the landlord to take decree on the basis of facts as pleaded in the plaint and in case the plaintiff proves his case of sub-letting by the defendant-tenant. It may be true that some specific pleadings may be required by law and in absence of specific pleadings, the court may even reject the plaint under Order 7 Rule 11,C.P.C. on the ground that from the pleadings, no cause of action is disclosed. Then in that situation, it is also duty of the defendant, even as per sub-rule (1) of Rule 1 of Order 8, that the defendant is required to submit his statement of defence at or before first hearing or within such time as the court may permit. The statement of defence as required to be submitted under sub-rule (1) of Rule 1 of Order 8,C.P.C. is statement of defence which are available to the defendant, may be on the question of fact or on the question of law. The defendant cannot say that he kept the defence with him so that the plaintiff may not know the legal defence on the basis of which the defendant may seek dismissal of the suit of the plaintiffs. The defendant is required to be made aware of all facts as well as grounds on the basis of which the plaintiff is seeking decree against the defendant so that the defendant may contest the suit effectively and may take all appropriate defences and, in the same way, the defendant is also required to come forward with his all defences in the written statement so that the plaintiffs may be made aware before the trial that the defendant is seeking dismissal of the suit of the

plaintiffs on the grounds mentioned in the written statement so that the plaintiffs may contest the defences raised by the defendant. The plaintiffs also cannot be given surprise by the defendant by raising objection, may it be on question of law. Exception to this proposition is also well known and where there is a pure question of law and there is objection about lack of inherent jurisdiction is there, then the defendant in the facts and circumstances of the case, may take such plea even in second appellate stage. But where defect which can be cured if the other party would have taken objection in time then in that situation, the defendant cannot be permitted to raise plea at belated stage, that is appellate or second appellate stage. In view of the above reasons also, this Court is of the view that in the present facts and circumstances of the case, the plea of absence of specific plea of sub-letting “without permission of the landlord” is not available to the tenant.

The learned counsel for the appellant tried to invite attention of this Court to the plaintiff's allegation and to the statements of the plaintiff and defendant and their witnesses to demonstrate that the first appellate court committed error of law by reversing the finding of the trial court on the question of sub-letting. The learned counsel for the appellant tried his best to convince this Court that this Court if will re-appreciate the evidence of both the parties, this Court may reach to a

conclusion that the first appellate court has taken erroneous view on the question of fact of sub-letting by the tenant. It is not a case of misreading of evidence of any witness or non-consideration of material evidence or ignoring the relevant evidence and taking into consideration of irrelevant evidence. Not only this even after going through the statements of the witnesses, particularly PW-1 Dr. Parmeshwar Nath Mathur and PW-2 Smt. Shakuntala as well as one of the sub-lettees who appeared as witness of the plaintiffs and supported the case of the plaintiffs, this Court is of the view that the first appellate court was also conscious that two of the alleged sub-lettees were working in the same department in which the plaintiff no. 1's husband was in service and thereafter, the first appellate court observed that in this situation, the statements of the witnesses are required to be examined carefully. The first appellate court observed that when the statement of witness Bhanwar Lal (PW-4) was recorded, the plaintiff no.1's husband Jagjeewan Lal already expired and the defendant himself admitted that not only Bhanwar Lal but other persons named by the plaintiff were permitted to live in the part of the premises. In this case, though there is evidence about sub-letting for a consideration of Rs.100/- per month, has been proved only for one tenant then it was the duty of the appellant-tenant to prove the fact of permissive possession of these persons in the suit premises with the consent of the landlord in which he

failed. In view of the above reasons, substantial question of law no.1 is decided against the appellant for the reasons mentioned above.

Substantial questions of law no.2 and 3 are, in substance, connected with each other and hence are decided jointly. The plea has been taken by the appellant that the appellant-tenant constructed two shops in the front of the rented premises and the shops are situated on municipal land and only a portion of boundary wall was demolished for construction of shops, then firstly, there is no material alteration by only removal of a small portion of boundary wall of the rented premises and secondly, no construction has been made within the rented premises. A bare perusal of the written statement shows that the plea taken by the tenant before this Court was never the defence of the defendant. It was never the case of the defendant in his written statement that two shops were constructed by the defendant, are situated not within the rented premises. Contrary to it, it is admitted case of the defendant-appellant-tenant that the two shops were constructed within the rented premises. It appears that the said plea has been taken by the defendant only because of the reason that after completion of the evidence of the plaintiff and her witnesses, the defendant in his statement, without there being pleading, could state that in fact the land where the shops were constructed by the defendant, was not of the landlord Jagjeewan Lal and it was municipal

land and said Jagjeewan Lal told the defendant that the land is not covered in the *Patta* of the landlord and, therefore, you may construct the shops so that my possession will be proved over the land in dispute. Not only that, the defendant has not pleaded so, as stated by him in the court in his evidence but it appears that no such suggestion was given to the plaintiff Smt. Shakuntala (PW-2) or her brother Dr.Parmeshwar Nath Mathur (PW-1) that the land in question where the shops were constructed, is the land of municipal council and not of the landlord. That suggestion was rightly not given to the plaintiffs and her witnesses by the defendant because of the obvious reason that by that time, the defendant's clear case was that he raised the construction of shops over the rented premises and he raised the construction by exercising his right as of tenant and according to the defendant's written statement itself, he claimed that he had a right to put wooden cabin or wooden shops within the rented premises. Therefore, the substantial questions nos.2 and 3 in fact does not arise in the appeal as they are contrary to the admission of the defendant that he raised the construction over the property in dispute as tenant and in his defence it was not the case of the defendant that shops are on municipal land.

The learned counsel for the appellant tried his best to assail the finding of the first appellate court about the material alteration in the suit premises and projected that the material alteration is only by

breaking the boundary wall. Whereas in fact the first appellate court, after considering the evidence of both the parties as well as the photograph (Ex.7) produced by the plaintiffs, held that the shops are not made of wooden planks nor they are wooden cabins but they are made of pillars and cement wall. The photograph (Ex.7) also clearly shows that the shops has its gate on the boundary wall and depth-wise it is within the premises in occupation of the defendant-tenant. It is not the case that the defendant-tenant has put any wooden cabin in front of the rented premises and that cabin is on the municipal land. The question that construction was of permanent nature and materially altered the suit premises is basically question of fact and when that finding of fact on this issue has been recorded by the courts below on the basis of evidence available on recored and the finding cannot be said to be perverse or vitiated because of non-consideration of any evidence, then there appears to be no reason to interfere in the judgment and decree of the court below, even if there is possibility of second view of the appellate court, which is not the situation in the present case.

The learned counsel for the appellant heavily relied upon the few judgments of this Court, and one of which is delivered in the case of Smt. Supyar Bai vs. Smt. Goardhan Bai through her Legal Representatives (1992(1) WLC(Raj.) 590), wherein it has been held that

the landlord is required to establish that the tenant has made construction and such construction has been made without permission of the landlord and the construction so made has materially altered the premises or is likely to diminish its value. These three conditions are to be cumulatively satisfied by landlord before a decree for eviction can be passed against the tenant and if any of these conditions are not satisfied, the decree cannot be passed. This Court in the said judgment held that materially altered means a substantial change in character, form and structure of building without destroying its identity. This Court held that it means that nature and character of change or alteration of building must be of important nature. In that case, the tenant made construction of room on roof of leased accommodation. That room was found to be constructed without any foundation being dug and, therefore, that was not found to be a case of change in form or structure of the premises. The roof of wooden planks held to be of temporary nature and it was easily removable without causing damage to premises. In said case of Smt. Supyar Bai, the finding has been recorded by the court that the structure is of temporary nature.

Another judgment relied upon by the learned counsel for the appellant is delivered in the case of G. Reghunathan vs. K.V. Varghese ((2005) 7 SCC 317). The Hon'ble Apex Court considered the meaning of material alteration with reference to the Kerala Building (Lease and

RentControl) Act, 1965, wherein the language used is as under:-

> "11.(4) .....
>
> (i) ....
>
> (ii) if the tenant uses the building in such a manner as to destroy or reduce its value or utility materially and permanently;"

The Hon'ble Apex Court held that mere proof of reduction or even destruction of utility or value is not sufficient and the words "materially and permanently" are important. Hon'ble the Apex Court also considered various judgments of the Supreme Court wherein there were allegations of construction of wooden balcony in the show-room, replacing of wooden door of the building by rolling shutter etc. which were not held to be material alteration .

The another judgment relied upon by the learned counsel for the appellants is delivered in the case of Waryan Singh vs. Baldev Singh ((2003) 1 SCC 59). In this case, the Hon'ble Apex Court held that enclosing verandah by constructing walls and placing a rolling shutter in front, in themselves do not sufficient to justify inference that value or utility has been impaired. The Hon'ble Apex Court held that under the E.P. Urban Rent Restriction Act, 1949, the eviction decree can be passed on proving under Section 13 that the tenant has committed such acts as are likely to impair materially the value and utility of the building or rented land.

Above judgments except the judgment of this Court delivered in the case of Smt.Supyar Bai (supra) deal with the relevant provisions of law, which had specific language like, use of the premises by the tenant in a manner as to destroy or reduce the value or utility materially and permanently or the tenant has committed such acts as are likely to impair materially the value and utility of the rented premises, whereas the Act applicable to the present case, that is the Act of 1950, language is materially different. Sub-clause (c) of Section 13(1) is as under:-

> "Section 13(1)(c):- that the tenant has without the permission of the landlord made or permitted to be made any such construction as in the opinion of the court has materially altered the premises or is likely diminish the value thereof."

Section 13((1)(c) says that if the tenant has without the permission of the landlord made any construction as in the opinion of the court has materially altered the premises or is likely to diminish to the value thereof. Therefore, diminution of the value because of material alteration is not condition precedent for passing the decree against the tenant for eviction when it is found that in the opinion of the court, the tenant has made any construction which in the opinion of the court, has materially altered the premises. In the present case, as said above, the land over which the two shops were constructed, was open land. Then that land stands converted into shops. It is admitted

case that those two shops were put to use for a purpose which may be connected with the business of the defendant-tenant but that connection is in fact remote connection. The defendant's own case was that he took the premises on rent for residential as well as for his kerosene oil trade. In that situation, construction of two shops, that too in the front of the building on open land of the rented premises, with cement walls, certainly altered the premises materially. Not only that that altered the premises materially but it also affects the value of the property as in front of main building, there are shops of permanent character, which may affect the front view of building. Therefore, in view of the above reasons, the substantial questions no.2 and 3 are decided that in fact both the substantial questions no.2 and 3 do not arise in the appeal as there is no factual foundation for raising this issue and mere statement of the defendant alone without there being any pleading, cannot be a ground for seeking any relief, particularly when such case of the defendant was not put to the plaintiffs and secondly, the court below rightly held the construction to be of permanent nature and amounting to material alteration in the rented premises. In view of the above the appeal deserves to be dismissed.

At this juncture, the learned counsel for the appellants submitted that the appellant may be given sufficient time because of the reason that he has large business and he will have to make arrangements for

shifting the business. Looking to the facts of the case as well as the nature of the business of the appellant, it will be appropriate to allow the appellant to remain in occupation till 30.4.2008.

Therefore, it is ordered that in case, the appellant furnishes a written undertaking before the trial court within a period of three months from today that he shall hand over the vacant possession to the landlord by or before 30.4.2008 and shall not part with the possession or sublet the suit premises during this period and shall pay all the arrears of rent and decretal amount, if due, and shall also pay the rent up to 30.4.2008 (in advance) within a period of three months from today before the trial court or directly to the landlord, the decree under challenge shall not be executed till 1.5.2008.

In case of non-compliance of the order or default in payment of amount mentioned above, the decree shall become executable forthwith.

With the aforesaid concession, this appeal is dismissed.

(PRAKASH TATIA),J.

mlt.